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Nos. 90-913 and 90-914

In the Supreme Court of the United States

OCTOBER TERM, 1991

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM OF THE UNITED STATES OF AMERICA, PETITIONER

v.

MCORP FINANCIAL INC., ET AL.

MCORP, ET AL., PETITIONERS

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM OF THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

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ARGUMENT

In our opening brief, we demonstrated that: (a) Congress, through 12 U.S.C. 1818(i), has expressly divested the courts of jurisdiction to review or interfere with the Federal Reserve Board's enforcement actions until the Board issues a *final* decision; (b) a court may not enjoin the Board's enforcement action in this case under the

principles set forth in *Leedom* v. *Kyne*, 358 U.S. 184 (1958); and (c) the Board, in any event, has statutory authority to promulgate and enforce the source of strength policy that MCorp ultimately challenges. We find it necessary to restate those central points because MCorp neither responds directly to our arguments nor defends the court of appeals' decision on its own terms. Instead, MCorp takes this Court on a circuitous journey through irrelevant provisions of bankruptcy and banking law, misstating the facts, the law, and our position along the way.

A. The Bankruptcy Code Does Not Give The Courts Jurisdiction To Restrain The Federal Reserve Board's Enforcement Proceeding

1. MCorp first argues that "prosecution of the Board's administrative proceedings would violate the automatic stay of the Bankruptcy Code." MCorp Br. 10-17. The initial difficulty with that argument is that it does not address the question at issue. As the court of appeals recognized, the pivotal issue in this case is whether the district court had authority, despite the jurisdictional limitation imposed by Section 1818(i), to enjoin ongoing Board enforcement proceedings.[1] The Bankruptcy Code's automatic stay provision, 11 U.S.C. 362, does not confer jurisdiction, and it did not grant the district court power

[1] Section 1818(i)(1) provides that "except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section." 12 U.S.C. 1818(i)(1). MCorp repeatedly contends that the Board "acknowledges" or "[c]onced[es]" that

section 1818(i) does not provide a "jurisdictional bar"; it merely "calls for the exhaustion of administrative remedies." MCorp Br. 12, 19, 48 (citing Gov't Br. 32, 35). MCorp misstates our position. Section 1818(i) plainly imposes a jurisdictional limitation; we explained in our opening brief that it does not impose a *complete* jurisdictional bar to judicial review. See Gov't Br. 32. That jurisdictional limitation "*effectively* calls for the exhaustion of administrative remedies." *Id.* at 35 (emphasis added).

to act in contravention of the limitations that Congress set out in Section 1818(i).[2]

In any event, the Bankruptcy Code's automatic stay provision, by its own terms, does not prevent the Board from exercising its normal regulatory and enforcement duties with respect to MCorp, which remains in business as a debtor-in-possession. The Bankruptcy Code expressly provides that the filing of a bankruptcy petition stays the commencement or continuation of "a judicial, administrative, or other action or proceeding against the debtor," 11 U.S.C. 362(a)(1), but it does *not* stay "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power," 11 U.S.C. 362(b)(4). See Gov't Br. 23-24. Thus, MCorp remains subject to the Board's

[2] Thus, the court of appeals found no need to address the scope of the Bankruptcy Code's automatic stay. J.A. 36 n.7. Moreover, the stay at issue in this case did not arise "automatically," without intervening judicial action. Rather, MCorp filed a complaint and motion for injunctive relief requesting that the bankruptcy court issue an order "restraining and enjoining the Board from prosecuting" its enforcement actions. J.A. 122, 138. The court's authority to grant relief, even as to enforcing an "automatic" stay, was necessarily qualified by statutory provisions, such as 18 U.S.C. 1818(i), that impose jurisdictional limitations. For example, the courts of appeals have held that the Norris-LaGuardia Act's similar jurisdictional limitation, 29 U.S.C. 101, precludes judicial enforcement of an automatic stay. *Briggs Transp. Co.* v. *International Bhd. of Teamsters*, 739 F.2d 341, 343-344 (8th Cir.), cert. denied, 469 U.S. 917 (1984); *In re Crowe & Assocs., Inc.*, 713 F.2d 211, 214-216 (6th Cir. 1983); *In re Petrusch*, 667 F.2d 297, 299-300 (2d Cir. 1981), cert. denied, 456 U.S. 974 (1982). MCorp attempts to distinguish decisions such as *Briggs* and *Crowe* on the ground that the Norris-LaGuardia Act protects substantive rights of private parties. MCorp Br. 12 n.8. As this Court has observed, however, "Congress passed the Norris-LaGuardia Act to curtail and regulate the jurisdiction of courts, not * * * to regulate the conduct of people engaged in labor disputes." *Marine Cooks* v. *Panama S.S.*, 362 U.S. 365, 372 (1960).

regulatory power to ensure the safety and soundness of MCorp's banking operations.[3]

MCorp's attempts to characterize the Board's actions as falling outside the "police or regulatory power" exception are unpersuasive. The Board's "notice of charges" plainly specified that the Board was commencing proceedings to require MCorp to comply with its statutory and regulatory obligations. See J.A. 56-64, 87-93, 186-195. Indeed, MCorp itself describes the Board's cease-and-desist proceedings as "administrative enforcement proceedings" (Br. 2, 5) and acknowledges that the Board instituted them specifically to enforce Section 23A of the Federal Reserve Act and the Board's source of strength policy (Br. 2, 5).[4] There is simply no reasonable basis for disputing that the Board's cease-and-desist proceedings are "administrative" actions, 11 U.S.C. 362(a)(1), "by a governmental unit to enforce such governmental unit's police or regulatory power," 11 U.S.C. 362(b)(4).[5]

[3] The Bankruptcy Code's legislative history confirms that Section 362(b)(4) broadly exempts a wide range of police power or regulatory actions from the automatic stay, even if those actions directly affect the disposition of the debtor's property. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 343 (1977) ("where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay").

[4] The Board's administrative proceedings in this case serve important regulatory objectives related to the protection of the safety and soundness of the nation's banking system. Section 23A of the Federal Reserve Act, 12 U.S.C. 371(c), limits self-dealing between and among bank holding company subsidiaries while the Board's source of strength policy promotes the financial stability of banking subsidiaries. The Board's administrative proceedings effectuate those regulatory objectives by curing past and preventing *future* regulatory violations. See J.A. 61-63, 89-92, 191-193.

[5] The courts of appeals have held that a variety of comparable regulatory actions that have a direct and immediate impact on the debtor's property are nonetheless exempt from the automatic stay. See, *e.g.*, *In re Commonwealth Cos.*, 913 F.2d 518 (8th Cir. 1990) (government's False Claim Act action to recover money damages and civil money penalty exempt from automatic stay); *Brock* v. *Rusco Indus.*, 842 F.2d 270, 273 (11th Cir.) (Fair Labor Standards Act action to recover unpaid minimum wages exempt from automatic stay), cert. denied, 488 U.S. 889 (1988); *In re Berry Estates*, 812 F.2d 67, 71 (2d Cir.) (rent control proceedings exempt from automatic stay), cert. denied, 484 U.S. 819 (1987); *NLRB* v. *Edward Cooper Painting, Inc.*, 804 F.2d 934, 941-942 (6th Cir. 1986) (NLRB unfair labor practice proceedings for back wages exempt from automatic stay); *Cournoyer* v. *Town of Lincoln*, 790 F.2d 971 (1st Cir. 1986) (action to enforce zoning restrictions on land use exempt from automatic stay); *CFTC* v. *Co Petro Mktg. Group*, 700 F.2d 1279 (9th Cir. 1983) (CFTC action to enjoin violations of Commodity Exchange Act exempt from automatic stay); *SEC* v. *First Financial Group*, 645 F.2d 429, 437 (5th Cir. 1981) (SEC proceeding to enjoin fraudulent sales of securities exempt from automatic stay).

MCorp nevertheless argues that the "police or regulatory power" exception should not apply here because the Board's regulatory action may have the effect of allowing the Board "to obtain possession of or exercise control over a debtor's property or to assess or recover a claim." MCorp Br. 15, citing 11 U.S.C. 362(a)(3) and (6). The difficulty with that argument is that it completely ignores the regulatory character of the Board's proceedings. The Board initiated its administrative proceedings to determine whether MCorp has violated federal statutory or regulatory requirements and to determine what, if any, actions are necessary to put MCorp's operations in compliance with the law. See 12 U.S.C. 1818(b)(1). The mere conduct of an administrative proceeding under the Board's cease-and-desist authority does not amount to the assertion of any control over property of the debtor or in the collection or recovery of a claim against a debtor.[6]

[6] MCorp also cites (Br. 15) the Board's issuance of a temporary cease-and-desist order to suggest that the Board has done more than simply conduct administrative proceedings. However, the relevant provisions of the Board's October 1988 temporary order, which sought MCorp's compliance with the source of strength policy, were

If the Board determines that MCorp has violated federal banking law and regulations, the Board "*may* issue * * * an order to cease and desist from any such violation or practice." 12 U.S.C. 1818(b)(1) (emphasis added). The fact that a cease-and-desist order *might* direct MCorp to expend money, either to recapitalize its subsidiary banks or to make restitution for past violations, does not change the regulatory character of the current administrative action.[7]

MCorp also notes (Br. 21) that failure to comply with a final administrative order can give rise to liability for a substantial civil money penalty. See 12 U.S.C. 1818(i)(2). As MCorp recognizes elsewhere (Br. 14 n.12), however, an agency's efforts to fix money damages for a

suspended by the Board shortly after the order was issued, pending MCorp's negotiations with the FDIC. J.A. 184-185. The Board has not reinstated those provisions and they have no effect on MCorp.

[7] This Court observed in *Ohio* v. *Kovacs*, 469 U.S. 274 (1985), that the "automatic stay provision does not apply to suits to enforce the regulatory statutes of the State," and distinguished the prosecution of regulatory actions from "the enforcement of such a judgment by seeking money from the bankrupt." *Id.* at 283 n.11. Here, the prosecution of the regulatory action—rather than the enforcement of any resulting order—is at issue, and MCorp's speculation about the issuance and content of any order is *only* speculation at this juncture. If the Board ultimately issues an order, that order may be "stayed, modified, terminated, or set aside by action of the agency or a reviewing court," 12 U.S.C. 1818(b)(2) and (h)(2).

Contrary to MCorp's suggestion (Br. 12), the Board has not conceded that the automatic stay would necessarily apply if the Board actually issues an order at the end of the administrative proceedings. It is by no means clear that enforcement of an order requiring, for example, that MCorp recapitalize its *own* subsidiary banks to satisfy its regulatory obligations can be equated with the enforcement of a money judgment requiring payment of a sum to a third party. Cf. *Kovacs*, 469 U.S. at 283-284 n.11. And contrary to MCorp's suggestion (Br. 15), the Board has never required a bank holding company to transfer assets to the receivers of a closed bank.

violation of law is exempt from the automatic stay.[8] The mere prospect of future assessment of a civil penalty for violation of a cease-and-desist order that has yet to be issued is not sufficient to render the Board's cease-and-desist proceeding an action "to collect, assess, or recover a claim against the debtor," 11 U.S.C. 362(a)(6).[9]

Finally, even if MCorp were correct in asserting that the automatic stay applies to the Board's enforcement actions, the stay provisions would require only that the Board refrain from prosecuting its actions during the bankruptcy case and would not empower a court to review the substantive validity of the Board's regulations and policies. See 11 U.S.C. 362(a) (restraining the "commencement or continuation" of various proceedings). Thus, even under MCorp's theory of the case, the Bankruptcy Code's automatic stay provisions would not be adequate to support the court of appeals' judgment in this case, which prohibits the Board from ever enforcing its source of strength policy against MCorp. See J.A. 36.

2. MCorp also contends, as an alternative to its argument based on the Bankruptcy Code's automatic stay

[8] The courts of appeals have repeatedly held that an administrative action to reduce a monetary claim to an administrative judgment is not stayed under the Code. See, *e.g.*, *NLRB* v. *P*I*E Nationwide, Inc.*, 923 F.2d 506, 512 (7th Cir. 1991); *United States* v. *Nicolet, Inc.*, 857 F.2d 202, 209 (3d Cir. 1988); *EEOC* v. *Rath Packing Co.*, 787 F.2d 318 323-326 (8th Cir.), cert. denied, 479 U.S. 910 (1986); *NLRB* v. *Edward Cooper Painting, Inc.*, 804 F.2d at 943. See also H.R. Rep. No. 595, *supra*, at 343. Cf. *Nathanson* v. *NLRB*, 344 U.S. 25, 30 (1952) (bankruptcy court should defer to administrative agency's expertise and allow agency to liquidate money claim within agency's administrative expertise).

[9] The need for a stay would arise, if at all, only *after* the Board issues a final cease-and-desist order. See 12 U.S.C. 1818(i)(2). FISA itself confers jurisdiction for the issuance of a stay after the issuance of the cease-and-desist order but prior to the assessment of civil penalties. 12 U.S.C. 1818(h)(2); see 12 U.S.C. 1818(b)(2). Thus, FISA and the Bankruptcy Code are entirely consistent in permitting the Board to complete its cease-and-desist proceedings prior to judicial intervention.

provisions, that "the district court has jurisdiction under Section 1334 to enjoin the Board's administrative proceedings pursuant to Section 105(a) of the Bankruptcy Code." Br. 17-26. That argument tacitly acknowledges, at least, that an injunction cannot issue unless the district court has a valid basis for exercising jurisdiction. The difficulty with the argument, however, is that there is nothing in 28 U.S.C. 1334 or 11 U.S.C. 105(a) that purports to repeal—or that even makes reference to—FISA's jurisdictional limitations.

MCorp attempts to find support in 28 U.S.C. 1334(b), which gives the district courts original, non-exclusive jurisdiction of "civil proceedings arising under title 11, or arising in or related to cases under title 11," and 28 U.S.C. 1334(d), which gives the district courts exclusive jurisdiction "of all of the property, wherever located, of the debtor * * * and of property of the estate." But whatever the content of those general jurisdictional grants, they remain subject to Section 1818(i)'s express limitation:

> except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

12 U.S.C. 1818(i). Section 1334 cannot give a district court jurisdiction to enjoin the Board's ongoing administrative proceedings because Section 1818(i) expressly provides that *no court* shall have that power. Moreover, as we have shown (Gov't Br. 26-28), Section 1334(b) and Section 1334(d), by their terms, are not applicable to the Board's administrative proceedings.[10]

[10] MCorp contends that the conclusion that the district courts do not have bankruptcy jurisdiction over the Board's administrative proceedings would be "faulty, illogical, and without precedent" (Br. 25). That conclusion, however, is compelled by the plain language of the statutes involved. Section 1334(b) does not purport to reach or affect the jurisdiction of administrative agencies. Instead, as the court of appeals explained (J.A. 17), Section 1334(b) gives the bankruptcy court concurrent jurisdiction over "civil proceedings" that would lie within the exclusive jurisdiction of another "court." 28 U.S.C. 1334(b). The ordinary meaning of the statutory terms "court" and "civil proceeding" do not encompass proceedings pending before an administrative tribunal. Cf. *Melkonyan* v. *Sullivan*, No. 90-5538 (June 10, 1991), slip op. 6-7 (statutory reference to "final judgment" in a "civil action" refers to order entered by a court, not the final decision of an administrative tribunal). Similarly, Section 1334(d) merely gives the court *in rem* jurisdiction to resolve issues affecting title to or control of the debtor's property. As such, it does not cover every controversy that may ultimately affect the estate, see *Callaway* v. *Benton*, 336 U.S. 132, 142 (1949), and it plainly does not bar the mere commencement and prosecution of regulatory proceedings to correct unsafe banking practices. Significantly, where Congress has intended that a bankruptcy provision extend to administrative proceedings, it said so expressly. See 11 U.S.C. 362(a)(1) (providing for a stay of certain "judicial, *administrative*, or other action[s]" against the debtor) (emphasis added). Moreover, the result that we urge is consistent with the familiar and sensible principles of ripeness, exhaustion of remedies, and finality.

At bottom, MCorp asks this Court to find an implied repeal of Section 1818(i). As we explained in our opening brief (at 21-22), there is a strong presumption against implied repeals in general and against implied repeals of jurisdictional limitations in particular. Here, MCorp's request for an implied repeal rests on nothing more than the nebulous assertion that the private pecuniary interests of the debtor and its creditors must take precedence over the public interest in bank safety. The court of appeals correctly concluded that the Bankruptcy Code does not require that startling result. J.A. 16-22.[11]

[11] MCorp has continued to operate a banking business during the pendency of the bankruptcy proceedings at issue here. Yet the upshot of its argument is that the filing of a bankruptcy petition disables the Board from enforcing the regulatory requirements that apply to any other bank holding company. Thus, in MCorp's view, the bankruptcy laws create a safe harbor from federal regulation, thereby ensuring that the debtor's ability to advance the private economic interests of its shareholders and creditors is not hampered by any obligation to cease and desist from unsafe or unsound banking practices. A business, however, cannot simply cast aside federal regulation by filing a bankruptcy petition. As this Court has re-

3. MCorp next makes a novel argument that the court of appeals "had jurisdiction to rule on * * * the question of the Board's statutory authority to exercise its alleged source-of-strength assessment authority" because the district court whose decision was under review (the U.S. District Court for the Southern District of Texas) could have assumed jurisdiction, under 28 U.S.C. 1334(b), over a pending suit in a different district court (the U.S. District Court for the Northern District of Texas) that raised a challenge, under 12 U.S.C. 1818(c)(2), to the Board's temporary cease-and-desist orders against MCorp. Br. 27-28.

This convoluted argument is flawed at every turn. First, MCorp did not raise this argument below, neither the court of appeals nor the district court sitting in bankruptcy even considered MCorp's unusual theory, and they did not purport to rule on issues pending in other courts.[12] Second, it is far from clear (and we do not concede) that a district court sitting in bankruptcy could have exercised jurisdiction, under 28 U.S.C. 1334(b), over a Section 1818(c)(2) challenge pending in another district court. That would depend on, among other things, whether the Section 1818(c)(2) challenge is a civil proceeding "related to cases under title 11." 28 U.S.C. 1334(b). Third, Section 1818(c)(2) in any event empowers the district court only to issue an order "setting aside, limiting, or suspending the enforcement, operation, or effectiveness of [a temporary cease-and-desist] order *pending the com-*

peatedly recognized, the filing of a bankruptcy petition does not give a bankruptcy trustee or a debtor-in-possession "*carte blanche* to ignore nonbankruptcy law." *Midlantic Nat'l Bank* v. *New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 502 (1986). See *Ohio* v. *Kovacs*, 469 U.S. at 285; *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 534 (1984).

[12] As we have explained (note 6, *supra*), the source of strength provisions in the Board's temporary order had been indefinitely suspended by the time of the district court action here. Hence, there was no live controversy with regard to that portion of the temporary order, and no basis, even under MCorp's theory, for a court to adjudicate the validity of the source of strength policy.

pletion of the administrative proceedings pursuant to the notice of charges served * * *." 12 U.S.C. 1818(c)(2) (emphasis added). Section 1818(c)(2) does *not* permit the district court to review or otherwise interfere with the final resolution of the administrative charges—Section 1818(h)(2) places that review within the exclusive preserve of the court of appeals. Cf. *Mid-America Bancorporation* v. *Board of Governors*, 523 F. Supp. 568, 577-578 (D. Minn. 1980). Not surprisingly, MCorp does not cite a single precedent for its novel jurisdictional argument. MCorp's contention as to what the court of appeals "had jurisdiction" to do is simply a red herring.

B. Non-Bankruptcy Law Does Not Give The Courts Jurisdiction To Restrain the Federal Reserve Board's Enforcement Proceeding

1. The court of appeals did not rely on any of MCorp's bankruptcy-based arguments to sustain the district court's jurisdiction. Instead, the court of appeals held that the district court could enjoin the Board's proceedings based on the narrow principle set forth by *Leedom* v. *Kyne*, 358 U.S. 184 (1958). MCorp all but abandons the court of appeals' reasoning, relegating its discussion of *Leedom* to the last few pages of its 50-page brief.

MCorp asserts (Br. 46-48) that the district court's exercise of jurisdiction is appropriate under *Leedom* because the Board misconstrued the scope of its delegated powers in adopting the source of strength policy. A litigant cannot invoke a court's jurisdiction under *Leedom*, however, by simply alleging that the agency has made an error in construing the scope of its authority. Rather, this Court's decision in *Leedom* holds only that an "inference" of federal court jurisdiction may arise where the " 'absence of jurisdiction of the federal courts' would mean 'a sacrifice or obliteration of a right which Congress' has given * * *." *Leedom*, 358 U.S. at 190. This case does not involve that situation. MCorp will have a full opportunity to obtain review of the Board's action, in accordance with 12 U.S.C. 1818, once the Board has issued a final decision.

Although MCorp briefly asserts that the district court would have jurisdiction under *Leedom*, it has no response to the arguments set forth in our opening brief. See Gov't Br. 29-36. MCorp does not explain why a court should rely on "inferred" jurisdiction based on *Leedom* where Congress has enacted a fully adequate, statutory basis for obtaining judicial review of the Board's final orders. See 12 U.S.C. 1818(h)(2).[13] MCorp does not explain how the mere filing of administrative charges, which does not constitute a final agency action binding the parties, can amount to an *ultra vires* act of such extreme impact as to warrant *Leedom*'s inference. And MCorp does not explain how the Board's resolution of an issue of statutory construction can amount to an *ultra vires* act when the court of appeals itself found that "Congress has not spoken clearly" to the issue (J.A. 33) and that the question is therefore governed by the second step of the analysis set out in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)—a step that presupposes that Congress has delegated authority to the agency to construe the meaning of the pertinent statutory terms. See *id.* at 844-845; Gov't Br. 33.

This Court has made clear that its decision in *Leedom* represents a narrow, rarely invoked exception to ordinary principles of judicial review. See, *e.g.*, *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964). MCorp's approach, however, would transform *Leedom* into a general source of judicially created jurisdiction and invite the lower courts to circumvent explicit congressional limitations on their power.

2. MCorp further argues that it should not be required to comply with the requirements of 12 U.S.C. 1818 —which effectively requires MCorp to exhaust its administrative remedies before seeking judicial review, see note I, *supra*—because "exhaustion is not necessary when the dispute concerns a purely legal issue." MCorp Br. 48-49, citing, *e.g.*, *McKart* v. *United States*, 395 U.S. 185, 197 (1969). The issue, however, is not what the "judicial" doctrine of exhaustion requires, *McKart*, 395 U.S. at 193, but rather what Congress has required. Section 1818 provides that "no court" shall have jurisdiction to enjoin a Board notice or order except under the conditions set forth therein. 12 U.S.C. 1818(i). The courts are obligated to comply with Congress's jurisdictional limitations, irrespective of any judicially created rules concerning exhaustion of administrative remedies. See *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 579 (1989) ("Our past cases have recognized that exhaustion of administrative remedies is required where Congress imposes an exhaustion requirement by statute.").

3. MCorp also incorrectly suggests in passing (Br. 49) that the court of appeals had jurisdiction, under 28 U.S.C. 2106, to direct the district court to enter the injunction against the Board. Section 2106—which provides that a court of appeals "may affirm, modify, vacate, set aside or reverse" any judgment brought before it for review—does not cure the district court's complete lack of jurisdiction to enjoin the Board's ongoing administrative proceeding. See *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934) ("An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review."). The authority granted under Section 2106 is, in any event, also subject to the limitations imposed by 12 U.S.C. 1818(i).

[13] This Court has repeatedly held that "a precisely drawn, detailed statute pre-empts more general remedies." *Block* v. *North Dakota*, 461 U.S. 273, 285 (1983). See, *e.g.*, *Great American Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 375-377 (1979); *Brown* v. *GSA*, 425 U.S. 820, 833 (1976).

C. The Board's Source of Strength Policy Is Based On A Valid Exercise Of The Board's Statutory Authority

Section 1818(i) means what it says. By its plain terms, it precludes the courts below from reviewing and enjoining the Board's ongoing proceedings, and accordingly there is no occasion at this juncture for judicial review of the validity of the Board's actions. MCorp nevertheless devotes a large portion of its brief to chal-

lenging the validity of the Board's source of strength policy. Despite the cardinal rule of statutory construction that "the starting point for interpreting a statute is the language of the statute itself," *Consumer Product Safety Comm'n* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980), MCorp largely ignores the relevant statutory language and launches into a winding exegesis of repealed statutes, unenacted legislative proposals, and statutory provisions other than those governing the Board's regulatory powers. The few shots that MCorp does aim at the pertinent statutory scheme fail to demonstrate that the Board's source of strength policy is invalid.

1. We explained in our opening brief (at 36-45) that the Board's source of strength policy is based on a reasonable construction of the Board's remedial powers under FISA, the BHCA, and ILSA. FISA, as amended by section 902 of FIRREA, gives the Board broad authority to remedy unsafe and unsound banking practices and specifically empowers the Board to order bank holding companies to make restitution to subsidiaries, to dispose of a loan or asset, or to "take such other action as [the Board] determines to be appropriate." 12 U.S.C. 1818 (b)(1) and (6).[14] As the court of appeals recognized (J.A. 30), Congress has not expressly defined what constitutes an unsafe or unsound banking practice requiring the exercise of these remedial powers. Instead, it left the development of appropriate standards to the regulatory agencies. Thus, under this Court's decision in *Chevron*, the Board's conclusion that a bank holding company's failure to act as a source of strength for its subsidiary banks constitutes an unsafe practice must be upheld unless it is an unreasonable or impermissible construction of the statute. See Gov't Br. 37.

MCorp does not contest the court of appeals determination that the source of strength policy must be assessed

[14] MCorp notes that the FIRREA amendments were enacted after the district court's decision (Br. 45), but it does not contest our assertion that these amendments apply to the administrative charges now pending against MCorp.

under *Chevron*'s deferential standard of review. Nor does MCorp assert that the Board's objective of promoting the safety and capital adequacy of subsidiary banks is somehow inconsistent with Congress's intent to prevent unsafe banking practices. Instead, MCorp maintains that: (a) Congress did not intend to give the Board "a blank check" to regulate any unsafe practice; (b) if Congress believed that the Board had authority to enforce the source of strength policy, it would not have subsequently strengthened the FDIC's remedial powers; and (c) the FIRREA amendments clarifying the Board's remedial powers are limited to "restitutionary type" remedies. MCorp Br. 43-45.

MCorp's arguments have no merit. First, the Board does not claim "blank check" regulatory authority; it asserts, in the context of a source of strength proceeding, only the authority to remedy holding company conduct that threatens the financial stability of a subsidiary bank—*i.e.*, conduct that is "unsafe and unsound." Second, Congress's recent enactment of the FDIC's cross-guarantee authority has no bearing on the Board's interpretation of different, previously enacted statutory provisions.[15] Congress's conclusion that the FDIC required special assessment powers after a bank failure says nothing at all about the substantive validity of the Board's policies, which are designed to prevent such a failure. Finally, MCorp's efforts to limit the FIRREA amendments to "restitutionary type" remedies is at odds with the plain language of the statute. The statute on its face empowers the Board to order bank holding companies to divest themselves of assets or "take such other actions as [the Board] determines to be appropriate." There is nothing in the

[15] The FDIC powers cited by MCorp permit the FDIC to assess a bank controlled by a holding company for the losses incurred by the FDIC as the result of the failure of another bank controlled by the same holding company. 12 U.S.C. 1815(c). The source of strength policy entails a markedly different remedial power, one that permits the Board to order an infusion of the parent *holding company*'s assets *before* the affiliated bank becomes insolvent.

text of the statute purporting to limit that power to "restitutionary" remedies. See *Freytag* v. *Commissioner*, No. 90-762 (June 27, 1991), slip op. 5 ("[C]ourts 'are not at liberty to create an exception where Congress has declined to do so.' *Hallstrom* v. *Tillamook County*, 493 U.S. 20, —— (1989).").

MCorp does not come to grips with our submission that the source of strength policy is rooted in the Board's authority under the BHCA to consider the "future prospects" of subsidiary banks when approving a holding company's acquisition of a bank subsidiary, 12 U.S.C. 1842(c), and the Board's related authority under ILSA to set minimum capital requirements for bank holding companies, 12 U.S.C. 3907(b). See Gov't Br. 37-44. MCorp acknowledges (Br. 39) that the Board can require a holding company to demonstrate its financial and managerial soundness at the time the company seeks permission to acquire a bank, and it also acknowledges (Br. 43) that the Board has power under ILSA to set minimum capital requirements for holding companies and nonbank subsidiaries. MCorp nevertheless argues (Br. 43) that the Board cannot require a holding company to use the Board-mandated capital levels as a source of strength for subsidiary banks after a bank acquisition is completed.

MCorp's argument is inconsistent with Congress's regulatory scheme. As we have explained, Congress gave the Board the power to set and enforce the appropriate minimum capital standards *in tandem* with a grant of express authority to prevent a holding company from engaging in unsafe and unsound practices that might jeopardize the company's subsidiary banks. See 12 U.S.C. 1818(b). The Board has adopted its source of strength policy—which requires that the bank holding company employ its available capital to promote the safety of subsidiary banks during periods of financial instability—to ensure that the congressionally authorized capital requirements are not frustrated in a manner that would threaten the safety and soundness of the company's banks. Thus,

the Board's policy effectuates Congress's intent. MCorp, by contrast, offers no explanation as to why Congress would grant the Board power to set and enforce capital standards for holding companies, but deny the Board power to ensure that a bank holding company employs its available capital to promote the safety of its subsidiaries.[16]

2. Much of MCorp's attack on the substantive validity of the Board's policy focuses, not on the statutes currently in force, but on provisions of the National Bank Act that were repealed more than 30 years ago. See MCorp Br. 29-32. MCorp essentially argues that: (a) those provisions incorporated a "shareholder assessment" requirement; (b) Congress irrevocably rejected such requirements in repealing the pertinent statutory provisions; and (c) the Board's source of strength policy imposes the very same "shareholder assessment" rejected by Congress.

MCorp relies on the questionable notion that Congress's intent in enacting FISA and the Bank Holding Company Act can be discerned from the actions of an entirely different Congress with respect to some other statutory scheme. MCorp essentially contends that the National Bank Act's shareholder assessment provisions and the Board's source of strength doctrine are essentially the same, and that Congress's views as to the former should be imputed as to the latter. The logic of that argument fails, however, because the two regimes are quite differ-

[16] MCorp also maintains (Br. 41-42) that the Board has only recently "discovered" the authority to impose on holding companies an on-going obligation to act as a source of strength to bank subsidiaries. That assertion is incorrect. The Board, long before the 1987 promulgation of the source of strength policy statement, relied on such authority in undertaking negotiations and other informal supervisory actions calculated to obtain a holding company's cooperation in ensuring that banking subsidiaries remain adequately capitalized. See 90-913 Pet. 15 & n.13. Cf. *United States* v. *Gaubert*, 111 S. Ct. 1267, 1274 (1991) (in addition to issuing regulations, agencies can establish policy "on a case-by-case basis, whether through adjudicatory proceedings or through administration of agency programs").

ent. The National Bank Act's assessments on bank shareholders were to be collected only *after* the bank had failed, in order to reduce losses incurred by the bank's creditors.[17] The Board's source of strength policy, in contrast, is *remedial* and *prospective* in nature. It is designed to prevent the failure of a bank—and the resulting losses to depositors and other creditors—by requiring the bank's parent holding company to provide needed capital *before* the bank fails.

There also is no logical connection between Congress's repeal of the shareholder assessment provisions and the validity of the Board's source of strength policy. Congress repealed the shareholder assessment provisions because they unfairly burdened small investors.[18] The Board's source of strength policy does not impose the same unfair burdens on small investors. The Board's policy imposes obligations only on the parent holding company to use "available resources," during periods of financial stress or adversity, to support its subsidiary banks. See Gov't Br. 7; 52 Fed. Reg. 15,707 (1987). Thus, the only bank shareholder subjected to the Board's regulatory authority is the one shareholder that exercises control over the bank and that can be held responsible for the bank subsidiary's operations, policies, and financial condition.

[17] Act of June 3, 1864, ch. 106, § 12, 13 Stat. 99, formerly codified at 12 U.S.C. 63. The statute directed the bank's receiver to enforce the required assessment where necessary to pay the bank's debts, ch. 106, § 50, 13 Stat. 114-115, formerly codified at 12 U.S.C. 192. See also Act of Dec. 23, 1913, ch. 6, § 2, 38 Stat. 273, formerly codified at 12 U.S.C. 64 (conferring similar assessment authority against stockholders who transferred shares within 60 days of the bank's failure).

[18] As Representative Steagall explained, the provisions often resulted in the dominant, managing shareholders, selling their stock before an assessment was imposed, leaving liable the small shareholders who had no part in the management or policies of the failed bank, who would not have the information needed to foresee the bank's impending insolvency, and who might not have the resources to pay the assessment. See 77 Cong. Rec. 3947 (1933).

3. MCorp's remaining substantive arguments (Br. 33-38) attempt to draw an adverse inference from Congress's failure to codify the Board's source of strength policy. No conclusions, however, can fairly be drawn from Congress's failure to enact legislation. Congressional inaction is inherently unenlightening; for example, congressional inaction here could just as easily be attributed to an affirmative recognition that the Board already had the necessary authority to adopt a source of strength policy. This Court has repeatedly stated its reluctance to draw any inferences from Congress's mere failure to enact a bill into law. See, *e.g.*, *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 306 (1988). MCorp offers no explanation why an exception should be made in this case.

Nor is there any basis for MCorp's suggestion (Br. 35-36) that Congress implicitly rejected the Board's source of strength policy when it enacted FIRREA's cross-guarantee provisions. As we have observed (note 15, *supra*), the source of strength policy and the FDIC's cross-guarantee authority differ in purpose and scope. There is simply no basis for believing that Congress intended to withdraw the Board's power to *prevent* a bank insolvency by authorizing the FDIC to reach bank assets *after* a default has occurred.[19]

[19] MCorp's efforts (Br. 34-35) to inflate the significance of the FDIC's views on the wisdom of the Board's source of strength policy statement are also unpersuasive. Some of the comments attributed to the FDIC are drawn from a *draft* report and are thus of dubious value in describing the "official" views of the agency. See MCorp Br. 34-35 & n.51. Moreover, the notion that a draft *agency* report "shaped congressional debate" on the FIRREA legislation and is therefore a reflection of the views of *Congress* is inconsistent with the well-established principle that remarks "made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 204 n.24 (1976). Indeed, although MCorp attaches great significance to the legislative consideration of FIRREA, it is unable to cite one statement made by a member of Congress during legislative consideration of FIRREA that expresses criticism of the source of strength policy.

4. MCorp relegates to a footnote (Br. 41 n.73) the new argument that the source of strength policy amounts to a substantive rule that has not been properly promulgated under the notice and comment procedures of Section 553 of the Administrative Procedure Act. One reason why such a portentous argument is discreetly tucked away may be that it was not presented to either the district court or the court of appeals. For that reason alone, MCorp's claim is not properly before this Court. *E.g.*, *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 602-603 (1991). In any event, the Board's policy statement did not in fact create new substantive obligations but merely explained and clarified existing agency practices developed over the course of its enforcement activities. See note 16, *supra*. MCorp is thus wrong in asserting that the Board's source of strength policy statement announced a new substantive rule requiring notice and comment rulemaking.

CONCLUSION

The judgment of the court of appeals should be affirmed to the extent that it vacates the district court's injunction with respect to proceedings on the Board's Section 23A charges, and the judgment should be reversed to the extent that it remands the case with instructions to enjoin proceedings on the Board's source of strength charges.

Respectfully submitted.

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